VIRGINIA SECTION

A PROBLEM IN REMAINDERS.—The writer, having recently had occasion to essay the interpretation of a devise and having found it bristling with complications and applications of rather infrequently occurring common law rules of remainders, believes the problems involved to be of sufficient general interest to justify the publication of the testamentary provision together with a tentative attempt at a solution.

In substance, the devise reads as follows:

> "I give my land to my son, J, for life and at his death to such children of his as may survive him for and during their natural lives with remainder in fee to the heirs of such surviving children forever. And in case J shall die leaving no such children surviving him or in case his surviving child or children shall die leaving no issue, then the remainder shall go to my other children, share and share alike, children of a deceased child to take *per stirpes.*"

The facts supposed are that J has four children who survive him, A and B (born *before* testator's death) and C and D (born *after* testator's death) all of whom have survived J.

First of all, we invoke the established rule of the common law (which has never been modified in Virginia by statute) that a remainder limited to the children or issue or heirs of an unborn person is void.[1]

Applying this rule to the devise, interpreted and modified in the light of the facts above stated, the devise would now read in substance as follows:

> "I give my land to my son, J, for life and at his death to A, B, C and D for their lives, with remainder in fee to the *heirs of A and B;* but if A, B, C and D die without issue, then the remainder shall go to my other children, etc."

This would seem to be a necessary construction, since under the rule above mentioned the remainder to the heirs of C and D (born *after* the testator's death) is void.

Should this construction be so far correct, two more questions arise: first, when does the remainder to "the heirs of A and B" take effect; second, when does the remainder or limitation over to the testator's other children take effect?

As to the first question, since *nemo est haeres viventis,* it is clear that either A or B, or both, must be dead before the remainder can vest in their heirs. The remainder to "the heirs of A and B" must therefore await either the death of A or B or the death of both A and B or the death of *all* the life tenants (A, B,

[1] See MINOR, REAL PROP., §§ 791, 792, and *ca. ci.*

C and D). In the first case, on the death of either A or B, the share of the one dying will go to his heirs as remaindermen under the will, leaving unaffected the life estates of the other children of J. In the second case, the death of A alone or of B alone would not permit the heirs of the one dying to take by way of remainder, since upon the second theory, both A and B must die before the heirs of either can take. Under either of these theories, the shares of C and D (still living) would seem to be unaffected. Only upon the death of either or both of the latter would their shares go to the heirs of A and B.

It is believed, however, that the third theory would furnish the true rule of construction, namely, that it is the intent of the testator that the property shall go to the heirs of A and B by way of remainder only after the death of *all* the life tenants (A, B, C and D).[2]

As to the second question, much the same point is presented. Is it the testamentary intent that the remainder shall go over to testator's children in portions, so to speak, as each of J's children shall die without issue, or that it shall go over only as an integer upon the death of *all* of J's children without issue? The second would seem to be the more probable construction, and will for our purposes be assumed to be correct.

If these conclusions are sound, then upon the death of one or more of the life tenants (less than the whole number) their shares could not go to the heirs of A and B, even though either or both of them be dead, for we have concluded that the heirs of A and B are to take nothing until *all* the life tenants are dead. Nor in like case can the shares of the deceased (even though they die without issue) go to the other children of testator, for we have just determined that the testator intended that they should take only in the event of the death of *all* of J's children without issue. Nor can the shares of the deceased go to their issue or heirs by *descent,* since none of them are given more than a life estate.

This therefore would seem to be a typical illustration of implied cross remainders for life between the life tenants (A, B, C and D), since upon the death of any one of them there is nowhere for the share of the deceased to go unless cross remainders for life are implied.[3] Consequently, should A, B, C or D die, with or without issue, his share would survive to the others for their lives, and so with each one's death, until the whole is ultimately vested for life in the last survivor.

Upon the death of the last survivor, if both A and B have died leaving issue, such issue will be their "heirs" and would take *per capita* by way of remainder under the will. Should A have died leaving issue and B without issue, then A's issue would be the remaindermen and would take the whole under the will, the issue of C or D, if any, not taking because C and D were not in being

[2] See MINOR, REAL PROP., § 788, and *ca. ci.*
[3] See MINOR, REAL PROP., § 788 and *ca. ci.*

at testator's death and their issue would be the heirs of persons not in being so that the remainder is void so far as they are concerned.

But should A and B have both died without issue, while either C or D or both have left issue, then the issue of the latter will constitute the heirs of A and B, and as such (not as the heirs of C or D) will be entitled to the remainder under the will. The deaths of A and B without issue would not of themselves entitle the testator's children to the property since, as we have seen, they are to take only in case all of J's children die without issue.

Because of the abolition of the Rule in Shelley's Case in Virginia, no allusion has been made to the evident application of that rule at common law to the instant case. The limitation "to such children of J as may survive him for their lives, with remainder in fee to the heirs of such surviving children forever" would seem to make a clear case for the operation of the rule, were it still in existence; nor would it be less clear should the devise be put in concrete form, "to A, B, C and D for their lives, with remainder to the heirs of A and B". The Rule in Shelley's Case would again operate.[4] It is perhaps fortunate that the existing law does not require the application of the rule to this case already sufficiently complicated.

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EVIDENCE—IMMATERIAL EVIDENCE REBUTTABLE TO PREVENT PREJUDICE.—Under what circumstances, if any, may the admission of immaterial evidence be justified or excused by the prior admission of similar evidence on behalf of the other party? If one party has been allowed to introduce incompetent evidence, may the opposing party afterwards offer similar evidence for the purpose of explaining or contradicting the prior inadmissible facts? If the opposing party objected to the admission in the first instance and was erroneously overruled, he could not claim the right to introduce similar incompetent evidence in rebuttal, because his objection would save him on appeal.[1] But if he did not object and has no such protection, under what circumstances, if any, may he afterwards introduce similar evidence?

This question arose in the recent Virginia case of *Graham* v. *Commonwealth*.[2] In rebuttal of the testimony of the accused, claiming self-defense, who had testified without objection that when deceased advanced towards him, reaching for his gun, he used violent and abusive language, when under the facts the admission in evidence of such language was immaterial and prejudicial, evidence of the deceased's nonhabit of swearing was ad-

[4] See MINOR, REAL PROP., § 767.
[1] 1 WIGMORE, EVIDENCE, § 15.
[2] 103 S. E. 565.